Nos. 97-1337, 97-1356, 97-1357

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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, *et al.*,

Petitioners,

-and-

COUNTY OF AITKIN, *et al.*,

Petitioners,

-and-

JOHN W. THOMPSON, *et al.*,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*, and UNITED STATES OF AMERICA,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS, MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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This brief opposes Petitions for Certiorari filed by the State of Minnesota (No. 97-1337) and certain Minnesota Counties (No. 97-1356) and Landowners (No. 97-1357). Respondents include two Minnesota Chippewa Bands (Mille Lacs and Fond du Lac) and six Wisconsin Chippewa Bands (Bad River, Lac Courte Oreilles, Lac du Flambeau, Mole Lake, Red Cliff and St. Croix), who were parties to the Treaty of July 29, 1837 (App. 484-89). The United States is also a respondent and is filing a separate opposition brief.

STATEMENT OF THE CASE

A. Background.

In the 1837 Treaty the Chippewa ceded land to the United States in present-day Wisconsin and Minnesota. App. 484. The United States promised, however, that the Chippewa could continue to hunt, fish and gather on the ceded lands. This promise is expressly stated in Article 5 of the Treaty (App. 486), which provides:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

As we show below, these rights remain in force to this day.

In 1983, in a case involving the Wisconsin part of the cession, the Seventh Circuit held that the rights secured by Article 5 continue to exist, and this Court denied certiorari. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983). On remand, the Western District of Wisconsin defined the nature and scope of the rights, as well as the scope of state authority to regulate their exercise. *See* App. 22 n.19 (subsequent history of *Lac Courte Oreilles*). The Court entered final judgment in 1991,

Lac Courte Oreilles Band v. Wisconsin, 775 F. Supp. 321 (W.D. Wis. 1991), and no party appealed.

The Chippewa have exercised their Article 5 rights in Wisconsin since the mid-1980s under the *Lac Courte Oreilles* decisions. The United States, the Bands and the State of Wisconsin have worked cooperatively to ensure effective harvest regulation and natural resource protection. For its part, the United States has *inter alia* provided annual appropriations to help fund tribal programs involving "off-reservation fish, wildlife, and gathering resources to which Indian treaty rights were reaffirmed in *Lac Courte Oreilles* and related cases,"[1] and promulgated annual Federal wildlife regulations that accommodate off-reservation hunting rights under the 1837 Treaty.[2]

B. District Court Proceedings.

The Mille Lacs Band commenced this case and the United States intervened to prevent Minnesota officials from interfering with the Band's exercise of its 1837 Treaty rights in the smaller, Minnesota portion of the 1837 cession.[3] Following *Lac Courte Oreilles*, the District Court held that the rights guaranteed in Article 5 continue to exist. App. 350. Also consistent with *Lac Courte Oreilles*, it held the rights can be exercised only on public

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1. *E.g.*, U.S. Dept. of the Interior Budget Justifications, F.Y. 1998 at pp. BIA 111-12; F.Y. 1997 at pp. BIA 99-100; F.Y. 1996 at pp. BIA 113-14. Notably, the appropriations are directed toward implementing the Chippewa's rights in the Minnesota as well as the Wisconsin part of the 1837 ceded territory. *Id.*

2. *See, e.g.*, 62 Fed. Reg. 46420, 46422-23 (Sept. 2, 1997); 61 Fed. Reg. 46352, 46355 (Aug. 30, 1996); 57 Fed. Reg. 35446, 35450 (Aug. 7, 1992). The regulations likewise cover the Minnesota as well as the Wisconsin part of the ceded territory. *Id.*

3. Approximately 25 percent of the 1837 ceded territory is in Minnesota. *See* note 4 below.

lands[4] and those private lands that are open to public hunting and fishing by operation of state law. App. 337-38.[5] Applying well-established law, including *Lac Courte Oreilles*,[6] the District Court held the State can regulate the exercise of the treaty right, but only to the extent necessary for conservation of the resources, public health or public safety. App. 344-45. The Wisconsin Bands intervened, and the Court applied these holdings to them, App. 210, and, in a separate case, to the Fond du Lac Band. App. 478.

Following the District Court's "Phase I" decision, the Bands prepared a conservation code and management plans to regulate harvest activities by their members in the Minnesota ceded territory. In good faith negotiations with the State defendants,[7] the Bands

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4. Out of approximately 3 million land acres in the Minnesota ceded territory, there are less than 440,000 acres of public lands on which Band members might be able to exercise their rights. Supp. Aff. of J. H. Gilbert at 3 (9-11-96). These figures should be contrasted with the Counties' (Pet. 3) and Landowners' (Pet. 21 n.28) erroneous figures of 13 million and 6.5 million acres, respectively.

5. The District Court later held that only private lands enrolled in Minnesota's tree growth tax program satisfy this requirement. App. 104-12. There are few, if any, such lands in the Minnesota ceded territory. Supp. Gilbert Aff. at 3-4.

6. *E.g. Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 & n.25 (1979); *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 & 401 n.14 (1968); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233, 1238-42 (W.D. Wis. 1987).

7. Contrary to the Counties' (Pet. 28) and Landowners' (Pet. 23 n.31) claims, no order compelled the State defendants to negotiate.

agreed to make many changes in these documents and coordinate harvest management and resource assessment with the State. The State defendants agreed that, in light of the revised Band code, management plans and protocols, there was no conservation, public health or safety need to apply most State conservation laws to Band members. App. 79-82.

The District Court denied defendants' request to further restrict Band harvests, because no showing was made that Band harvests would interfere with the rights of non-Band members. App. 138. It preserved defendants' right to seek an allocation of resources upon a proper showing in the future. App. 152, 163.

C. The Eighth Circuit's Decision.

The State defendants, Counties and Landowners appealed, alleging that the Bands' rights were extinguished or their claims otherwise barred on multiple grounds. *See* App. 16-70. The Bands cross-appealed, challenging the District Court's limitation of the lands on which they could exercise their rights. App. 70-72. The Eighth Circuit affirmed in all respects. App. 72.

The State (Pet. i) presents three questions here: whether the Bands' 1837 Treaty rights were extinguished by either: (1) an 1850 Executive Order; (2) an 1855 Treaty; or (3) the 1858 Minnesota Admission Act. We limit our description of the Eighth Circuit's opinion to these issues.[8]

1. The 1850 Executive Order. The 1850 Order purported to revoke the Chippewa's hunting, fishing and gathering rights and to order them to remove from the ceded territory. App. 21. Applying *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952),

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8. Other aspects of the opinion are either not embraced within any of the Petitions or are raised only by the Counties and Landowners. We address the additional questions they present in Section IV below.

and its progeny,[9] the Eighth Circuit held that the President had no authority unilaterally to order the removal of Indian people, and in purporting to do so violated the requirement in the 1830 Removal Act that the Indians consent to removal. App. 23-26. The Court noted that the "defendants do not cite to any evidence indicating that the President was authorized to remove the Bands without their consent." App. 25. Because it was "clear . . . that the Bands in this litigation did not give consent for removal," the Court concluded that "President Taylor had no authority for his 1850 Executive Order of removal." App. 26-27.

The Court then considered whether "the portion of the Order extinguishing the 1837 usufructuary rights is separate and severable from the portion of the Order requiring removal." App. 27. Using the test articulated in *Champlin Ref. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932), and applied in *New York v. United States*, 505 U.S. 144, 186 (1992), and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), App. 27-28, the Court held that the revocation portion of the Order cannot be severed from the directive to remove. App. 29. It noted that the purpose of the Order was to mandate removal, this purpose was integral to the entire Order, all of the historical evidence surrounding the Order related to removal, and there is no evidence that revocation of usufructuary rights would have been made independently of the removal mandate.

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9. *See Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject' ") (quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)); *Cole v. Young*, 351 U.S. 536, 557 & n.20 (1956) (when the President rests his action on statutory authority, "the validity of the action must be determined solely by the congressional limitations which the President sought to respect"). *See also United States v. Santa Fe Pacific RR Co.*, 314 U.S. 339, 355-56 (1941) (forcible removal of Walapais Indians to a reservation was "not pursuant to any mandate of Congress" and therefore "unauthorized" and of no legal effect).

App. 29-31.[10] Accordingly, it held the entire 1850 Order invalid. App. 31.[11]

2. *The 1855 Treaty.* The Court also rejected the argument that the 1837 usufructuary rights were terminated by the Treaty of February 22, 1855 (App. 502-14). Of the eight Bands in this case, only the Mille Lacs Band, but not the Fond du Lac or the six Wisconsin Bands, was a party to the 1855 Treaty. The 1855 signatory Bands ceded additional lands in north-central Minnesota and relinquished "all right, title, and interest" to any other lands. App. 502-03; *see* App. 35.

The Eighth Circuit analyzed the 1855 Treaty "in its historical context to determine whether the parties meant it to revoke usufructuary rights." App. 36. It considered both the understanding

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10. The District Court found that "the only reason that the 1850 executive order included language extinguishing the hunting, fishing, and gathering privilege was to facilitate removal of the Chippewa to benefit the Minnesota economy." App. 310. It also found that an order of revocation without removal would have been inimical to the purposes of the Order "because it would have halted useful trade in furs and other natural resources by the Chippewa without other benefit in return." *Id.* And, it considered and rejected the Landowners' argument (Pet. 7-8, 18-19) that the President would have revoked the Chippewa's usufructuary rights to clear land titles. App. 311-12.

11. The District Court held that the Order had no present effect on the Chippewa's treaty rights on several alternative grounds as well. It held that even if the Order could be severed, the President did not have unfettered discretion to revoke the Chippewa's rights under the treaty given the statutory duty of good faith imposed by the Northwest Ordinance, the Government's trust responsibility to Indian tribes, its explicit promises of just treatment during the treaty negotiations, and the Chippewa's understanding that their rights would be protected by the President. App. 313-15. The District Court (like the Seventh Circuit in *Lac Courte Oreilles*) held that the Order violated these duties, App. 315-16, and, in any event, was repealed by subsequent orders and treaties. App. 319-21. The Eighth Circuit did not consider these alternative grounds for decision. App. 31, n.25.

of the Indians[12] and the Government, and found that neither "intended or understood the treaty to work such a revocation." App. 36-37. It held that, "[g]iven the absence of any mention of the 1837 Treaty or its usufructuary rights in the 1855 Treaty or its negotiation process, and the lack of evidence that the parties intended to extinguish these rights," the 1855 Treaty did not revoke the Mille Lacs Band's usufructuary rights under the 1837 Treaty. App. 37-38. In so ruling, the Court carefully considered and distinguished *Oregon Dept of Fish & Wildlife v. Klamath Indian Tribe,* 473 U.S. 753 (1985). App. 38-39.

3. Equal Footing. The Court also rejected the argument that the 1837 rights were repealed by implication upon Minnesota's admission to the Union. It followed the analytical framework in *Crow Tribe v. Repsis,* 73 F.2d 982 (10th Cir. 1995), *cert. denied,* 116 U.S. 1851 (1996), App. 52-55, but found that the Bands' rights in this case were not "temporary and precarious" in the sense those terms were used in *Repsis*, and therefore survived statehood. App. 55. Applying settled law, the Court also found that the Bands' rights here "are not irreconcilable with the State's sovereignty," App. 56-58, and noted that "defendants have presented no evidence surrounding the legislation admitting Minnesota into the Union from which we could conclude that Congress intended to abrogate the 1837 Treaty rights." App. 59.

REASONS FOR DENYING THE WRIT

The decision below confirms the continued existence of the Chippewa's rights to hunt, fish and gather pursuant to the 1837 Treaty in the smaller, Minnesota portion of the 1837 ceded territory. These are the same rights confirmed by the Seventh Circuit fifteen years ago in the Wisconsin portion of the ceded territory. This Court declined to review the Seventh Circuit's decision then, and

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12. *See Passenger Fishing Vessel,* 443 U.S. at 676 ("treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians").

review is even less appropriate today. The issues have been settled with finality in Wisconsin for years, and the rights have been responsibly exercised by the Chippewa and actively supported by the United States. Moreover, the Eighth Circuit's decision does not conflict with decisions of other Circuit Courts or this Court and, because it is based on unique historical facts concerning the 1837 Treaty, 1850 Order and 1855 Treaty, does not present issues of general applicability. More specifically:

1. The controversy over the 1850 Order involves a single executive order with no significance outside this case and *Lac Courte Oreilles*. Both Circuits held the 1850 Order ineffective, as did the Wisconsin Supreme Court in 1972.[13] In reaching that result here, the Eighth Circuit correctly stated and applied the controlling law. Petitioners do not challenge the Eighth Circuit's conclusion that the President lacked authority to order removal and do not challenge the severability test it employed. Indeed, the only aspect of its holding regarding the 1850 Order that is challenged here is its *application* of the severability test. This narrow, fact-based challenge does not warrant certiorari.

2. The 1855 Treaty affects, at most, only one of the eight Bands. The Eighth Circuit applied well-established principles of treaty interpretation in holding that the 1855 Treaty did not revoke the Mille Lacs Band's hunting and fishing rights under the 1837 Treaty. Its decision discusses and distinguishes *Klamath*, where this Court held that hunting and fishing rights that were clearly tied to reservation lands were ceded when those reservation lands were ceded. In this case, the Chippewa's rights were expressly severed from the land when the land was ceded in 1837. The 1855 Treaty, which was intended to extinguish Indian land claims, did not affect these separate, treaty-secured hunting and fishing rights.

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13. *State v. Gurnoe*, 53 Wis. 2d 390, 405-07, 192 N.W. 2d 892, 899-900 (1972).

3. Nor is there any conflict among the Circuits regarding the equal footing doctrine and treaty secured usufructuary rights. The Eighth Circuit utilized the analytical framework set forth by the Tenth Circuit in *Repsis*, and correctly concluded that the treaty right at issue here was intended to survive statehood. Its ruling falls squarely within this Court's precedents, which confirm that treaty rights, even those subject to a power of revocation, are *not* impliedly repealed by statehood under the equal footing doctrine.

I. THE 1850 EXECUTIVE ORDER

A. The Eighth Circuit's Decision Does Not Conflict with This Court's Decisions.

Petitioners argue that the Eighth Circuit's holding that the 1850 Order was invalid conflicts with this Court's precedents concerning treaty interpretation and review of Executive Orders. *E.g.* St. Pet. 20-23; Co. Pet. 11-15; Ld. Pet. 14-15, 17-20. However, Petitioners do not confront the Eighth Circuit's analysis, which shows that the President had no authority to order the Chippewa to remove, and that the Order's removal and revocation clauses could not be severed. Petitioners fail to show that this analysis conflicts with any ruling of this Court, or that there was any error in the predicate findings on which it was based.

Significantly, Petitioners do not challenge the Eighth Circuit's holdings that the President had no authority to order removal unilaterally, and that Indian consent to removal was required by Congress in the 1830 Removal Act. App. 24-25. Further, Petitioners do not challenge the Eighth Circuit's holding that the Chippewa did not consent to remove in this case, identifying no treaty provision which provides such consent. And, Petitioners do not challenge the Court's conclusion that, because there was no authority for the directive to remove, it was unlawful.[14]

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14. To the extent the Counties argue that even Presidential orders that lack authority and conflict with Congressional directives must be (Cont'd)

This leaves only the Eighth Circuit's determination that the Order cannot be severed. Only the State addresses severability, and it agrees (Pet. 23) that the Eighth Circuit "appropriately cite[d] the test for severing an executive order." It argues only that the Court improperly applied this test. Pet. 23-24. While no such error was made,[15] the "misapplication of a properly stated rule of law" is in any event rarely grounds for a writ of certiorari. Sup. Ct. R. 10. The Court should not make an exception in this case. The 1850 Order has no continuing significance outside the issues presented here and in the *Lac Courte Oreilles* litigation. The Seventh and Eighth Circuits (the only Circuits with jurisdiction over the lands ceded in 1837) agree that the Order did not revoke the Chippewa's usufructuary rights. In the absence of any conflict between the Circuits, there is no need for this Court to review the application

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(Cont'd)

enforced by the Courts (Pet. 11-15), their argument is clearly foreclosed by *Youngstown*. App. 23, n.20; *see also Santa Fe*, 314 U.S. at 355-56. Notably, the Counties make no attempt to apply either their analysis or the cases they cite to the Eighth Circuit's holding regarding removal. For example, in *Dalton v. Spector*, 511 U.S. 462, 476 (1994), the Court interpreted an Act of Congress to confer unfettered discretion on the President to approve or disapprove a base closing recommendation. The Eighth Circuit found no such authority for removal in this case, and the Counties cite none.

15. The State's argument on the merits disregards the District Court's findings regarding the purpose of the Order and the Eighth Circuit's discussion of them. *See* note 10 and accompanying text above. Instead, it argues that, on its face, the Order had two objectives — revocation of usufructuary rights and removal. But the State cites no evidence of an intent to revoke the Chippewa's hunting and fishing rights absent removal. Notably, the Territorial Resolution it cites was entitled "a joint resolution related to the *removal* of the Chippewa Indians from the ceded lands within the Territory of Minnesota," and did not seek revocation of usufructuary rights absent removal. App. 566-67 (emphasis added).

of correctly stated principles of severability to the singular, 150-year old facts of this case.

B. The Issue Petitioners Raise Was Not Decided by the Eighth Circuit.

The issue pressed most strenuously by Petitioners — the scope of the President's authority under Article 5 of the 1837 Treaty — was not addressed by the Eighth Circuit. *See* App. 31 n.25 (declining to address standard for presidential action). Petitioners argue that Article 5 should be read to confer unfettered discretion on the President to revoke the Chippewa's rights at any time and for any reason. St. Pet. 21-22; Co. Pet. 13-14; Ld. Pet. 17-18. The District Court disagreed, holding on multiple grounds that the President did not have unfettered discretion, *see* App. 312-15 and note 11 above, but the Eighth Circuit's decision "obviates any need to consider" this issue. App. 31 n.25.[16] There can be no conflict between the Eighth Circuit's decision and Supreme Court precedent with respect to an issue not decided by the Circuit. Furthermore, certiorari is not appropriate to decide an issue the Circuit Court did not reach, especially where, as here, the grounds on which it did rely are dispositive and largely unchallenged.

C. The Questions Presented Do Not Warrant Review in Light of the District Court's Alternative Holding that the Order Was Repealed.

Although the Eighth Circuit did not reach the issue, the District Court also held that the 1850 Order was repealed. App. 319-21.

16. The State's assertion (Pet. 22) that the Eighth Circuit essentially read the phrase "during the pleasure of the President" out of the Treaty is wrong; the Court did not need to and therefore did not address the meaning of that phrase. Likewise, the Landowners' claim (Pet. 18) that the Court "dismissed the idea that the President could revoke the privilege without ordering removal" mischaracterizes the Court's decision; it did not address this "idea" because President Taylor did *not* revoke the privilege without ordering removal.

The Wisconsin Supreme Court reached the same conclusion in upholding Chippewa fishing rights in 1972.[17]

The District Court's conclusion was based on a careful analysis of a detailed historical record, the material parts of which were relied upon by the Eighth Circuit as well. App. 30, n.24. Minnesota officials sought the Order for economic reasons, to bring Chippewa from Wisconsin to Minnesota, so that the new Territory would benefit from sizable annuity payments and Indian agency operations. App. 251-53, 267. When removal efforts caused hundreds of Chippewa deaths from starvation and disease, App. 256-59, the United States suspended removal operations and did not reinstate them. App. 259-64; *see also* App. 30, n.24. Instead, it allowed the Chippewa to remain on ceded land, App. 264-66, gave them equipment to hunt and trap there, *id.*, and established reservations for them there in 1854 and 1855 treaties. App. 266-67, 274, 283. In 1855 government officials recognized the Bands' continued rights to hunt and fish on ceded lands under the 1837 Treaty. App. 269-71; *see also* App. 30, n.24.

There is no record of any reference to the 1850 Order for more than 70 years thereafter. App. 300.[18] Although the Order was invoked by federal officials in the 1930s to assert that the Chippewa's usufructuary rights had been revoked, there is no evidence that these officers considered the historical circumstances or made any determination regarding the validity or repeal of the

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17. *Gurnoe*, 53 Wis. 2d at 405-07, 192 N.W. 2d at 899-900.

18. This Court issued three opinions indicating that no removal order had been issued. *United States v. J.S. Stearns Lumber Co.*, 245 U.S. 436, 437 (1918); *Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *United States v. Thomas*, 151 U.S. 577, 582 (1894). In 1897 the United States Attorney argued that the Chippewa retained rights to hunt and fish under the 1837 Treaty, and the Minnesota Attorney General agreed. App. 326-27 & n.21. In 1925 the Bureau of Indian Affairs stated that there was "[n]o record" that the usufructuary rights reserved in the 1837 Treaty had been abrogated. App. 327.

Order. App. 300.[19] When the Executive Branch did so, it asserted repeatedly that the Order had no effect on the Chippewa's pre-existing rights.[20] The United States' position in this case is only the latest manifestation of what is now clear Federal policy that the Chippewa's 1837 rights remain in force. *See, e.g.*, notes 1 & 2 and accompanying text above.

The District Court held that the 1850 Order was repealed because the provisions of the 1854 and 1855 treaties were "completely contrary to the 1850 order" and "the executive branch intended to repeal" the order. App. 320-21 (citing, *e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976)). Given the District Court's and the Wisconsin Supreme Court's holding that the Order was repealed, the detailed factual findings supporting that holding, and clear Federal policy affirming the Chippewa's rights, Petitioners' arguments regarding the validity of the Order before its repeal do not justify review by this Court.

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19. The Counties (Pet. 19-21) and Landowners (Pet. 10-11, 20) also cite statements from the late 19th and early 20th centuries that the State could regulate Chippewa hunting and fishing. However, the extent of State authority to regulate treaty hunting and fishing rights was an open question until this Court's 1942 decision in *Tulee v. Washington*, 315 U.S. at 684-85. These pre-*Tulee* assertions of state regulatory authority thus have no bearing on the existence of the right. *See also* App. 297-98.

20. The United States advanced this position in 1954 in Court of Claims litigation involving Chippewa occupancy rights, App. 386, in 1983 in the *Lac Courte Oreilles* litigation, *see* United States' Motion to Dismiss and Affirm at 7, 12-13, *Besadny v. Lac Courte Oreilles Band*, 464 U.S. 805 (1983) (No. 83-6), and in this case.

II. THE 1855 TREATY

A. Factual Background.

The Government negotiated treaties with the Fond du Lac and Wisconsin Bands in September 1854 and the Mille Lacs and other Minnesota Bands in February 1855. App. 31-32, 34-35. "The evidence is overwhelming that neither party intended the 1854 Treaty to disturb usufructuary rights," App. 34, and no party challenges that holding here.

Article 1 of the 1855 Treaty cedes a ten million acre tract north and northwest of the 1837 cession. App. 35. It also states: "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." App. 35.[21] The 1855 Treaty does not mention usufructuary rights, and the rights guaranteed in the 1837 Treaty were not mentioned in the treaty negotiations. App. 35. However, contemporaneous with those negotiations, government officials, including the Minnesota Territorial Governor and *ex officio* Superintendent of Indian Affairs, acknowledged the continued existence of the Bands' usufructuary rights under the 1837 Treaty. *See* App. 269-71.

During the 1855 Treaty negotiations, Chippewa representatives expressed their understanding that the Government's purpose was

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21. The District Court found that the Government included this provision in the 1855 treaty to extinguish land claims of certain signatory Bands in northern Minnesota that were not included in the ten million acre tract. App. 286-88. The Government used broad language because it was not certain about the nature and scope of these land claims. App. 288. The District Court also found that the most likely Chippewa translation of this provision would have indicated that the Chippewa were transferring their remaining lands to the United States, but would not have conveyed any sense that they were relinquishing their hunting, fishing and gathering privilege under the 1837 Treaty. App. 284, 324-25.

to purchase land, and that the Chippewa would continue to hunt, fish and gather after the Treaty was concluded. App. 36. The United States drafted treaty provisions revoking usufructuary rights in other cases, but did not do so here. App. 36-37. The authorizing act for the 1855 Treaty showed that the United States was concerned about the extinguishment of land title, not usufructuary rights. App. 37.[22]

B. Because Only One of the Eight Bands in This Case Was a Party to the 1855 Treaty, the Question Whether the 1855 Treaty Revoked That Band's Usufructuary Rights Does Not Fundamentally Affect the Outcome of The Case.

Of the eight Bands in this case, only the Mille Lacs Band was a party to the 1855 Treaty. The Fond du Lac Band and the six Wisconsin Bands were instead parties to the 1854 Treaty. None of the Petitions before this Court seeks review of the Eighth Circuit's holding (App. 31-34) that the 1854 Treaty preserved the Bands' 1837 treaty rights. Thus, even if the Court were to determine that the 1855 Treaty revoked the rights of the Mille Lacs Band, the other seven Bands would retain their usufructuary rights in the Minnesota ceded territory. Since such a determination would not fundamentally alter the outcome of the case, certiorari is inappropriate.

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22. The District Court found that the retention of hunting and fishing rights was consistent with Federal policy, and that the terms of the Treaty and the negotiations indicate that both parties expected the Chippewa to continue to hunt and fish on ceded lands. App. 289-90. Had the Government sought to terminate 1837 usufructuary rights, it would have done so in the *1854* Treaty, when most of the Bands holding those rights were present, but it did not. App. 288-89. *See also Johnson v. Gearlds*, 234 U.S. 422, 438 (1914) (provision in the 1855 Treaty barring the sale of liquor on ceded lands "evidently contemplated that the bands of Indians, while making their permanent homes within the reservations, *would be at liberty to roam and to hunt throughout the entire country, as before*") (emphasis added).

C. The Eighth Circuit's Decision Is Consistent with *Klamath*.

The Eighth Circuit applied the principles of treaty interpretation articulated in *Klamath*, but found that the rights at issue here were materially different than those at issue in *Klamath* and were not terminated by the 1855 Treaty. It explained:

> The 1864 Treaty rights in *Klamath* were exclusive and *on-reservation* rights, and thus logically extinguished with a relinquishment of a portion of the reservation. The rights at issue in this litigation are *non-exclusive* and *off-reservation* rights, reserved in a treaty not mentioned in the 1855 Treaty or its negotiations. The situations are not analogous and do not compel the same outcome.

App. 39. This conclusion is sound and does not warrant certiorari.

In *Klamath* an 1864 treaty created a reservation and secured "the *exclusive* right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." 473 U.S. at 755 (emphasis added). The treaty did not provide for off-reservation rights. *Id.* at 755. Due to a surveying error, a large tract was excluded from the reservation. *Id.* at 755-56. In 1901, the Tribe ceded "all [its] claim, right, title and interest in and to" the excluded land. *Id.* at 760.

This Court conducted a "[c]areful examination of the entire record" to determine the intent of the parties. *Id.* at 774. The most important factor was that the 1864 treaty rights were "plainly . . . intended to be exercised within the limits of the reservation." *Id.* at 766-68. Because the rights were tied to reservation land, they were terminated when reservation land was ceded. *Id.* at 769-70. The Court distinguished treaties and agreements under which Indians "enjoy special hunting and fishing rights that are independent of

any ownership of land." *Id.* at 765-66 & n.17. Cases interpreting such rights shed no light on the case before it, which involved the "precedent question whether *any* off-reservation rights were intended to be reserved at all." *Id.* at 769, n.20 (emphasis added).

Petitioners read *Klamath* to hold treaty language ceding "all claim, right, title, and interest in and to" land extinguishes hunting and fishing rights as a matter of law. St. Pet. 20; Co. Pet. 17; Ld. Pet. 20-21. However, the Court did not construe the language in the abstract; it held the treaty had to be interpreted "in the entirety of its particular historical context," and its language given a "fair appraisal" based on "the entire record." 473 U.S. at 773 n.23 & 774.[23] The most important factor in *Klamath* — that the rights were tied to and could not exist independently of the reservation — is not present here, where a privilege of hunting and fishing was guaranteed on *ceded* lands in 1837. Indeed, the *Klamath* Court recognized that treaty rights such as those at issue in this case are "independent of any ownership of land" and are distinguishable from those at issue in *Klamath*. It did not hold that such "independent" treaty rights are extinguished as a matter of law by language ceding interests in land.

As required by *Klamath*, the Eighth Circuit analyzed the 1855 Treaty "in its historical context to determine whether the parties meant it to revoke usufructuary rights." App. 36. Although the Court's application of the *Klamath* test to the fundamentally

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23. *Cf. South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 799 (1998) (rejecting "literal construction" of savings clause in favor of "sensible construction" that avoids an "absurd conclusion" and gives effect to intentions of parties). In this case, the lower courts' interpretation avoided the "absurd conclusion" that the 1855 Treaty revoked the Mille Lacs Band's hunting and fishing rights when, only five months earlier, the 1854 Treaty preserved the same rights for the Fond du Lac and Wisconsin Bands. Instead, the lower courts' "sensible construction" gave the cession provision precisely the effect the Government intended it to have. *See* App. 327-28; note 21 above.

different rights and very different historical context in this case led to a different result, that does not establish a conflict with *Klamath.*[24]

The treaty history here is unique: a treaty explicitly reserving a hunting and fishing right on one tract of ceded land was followed by another treaty ceding a different tract of land and releasing all other land claims. Petitioners identify no similar situation involving any other Tribe, and such facts are unlikely to arise in another case. Certiorari to review the Eighth Circuit's application of well-established principles of law to these case-specific circumstances is inappropriate.

III. THE EQUAL FOOTING DOCTRINE

Citing *Repsis,* the State asserts (Pet. 10-11) there is a conflict between the Eighth and Tenth Circuits over whether treaty rights that are "temporary" in nature are extinguished under the equal footing doctrine. There is no such conflict. First, the Eighth Circuit here and Tenth Circuit in *Repsis* undertook the same analysis, determining the nature of the right first, and then considering whether the right had survived statehood. *Cf.* App. 55-58 *with Repsis*, 73 F.3d at 988. That a different result was reached by the Eighth Circuit, under a different treaty, with a different historical context, does not create a conflict between the Circuits. Second, the State's contention that Article 5 of the 1837 Treaty was extinguished by the equal footing doctrine is foreclosed by no less than four decisions of this Court, which establish that even a treaty right that is subject to later revocation by the United States is not invalidated by the equal footing doctrine.

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24. The Counties (Pet. 16) and Landowners (Pet. 20) also allege a conflict with *Red Lake Band v. Minnesota,* 614 F.2d 1161 (8th Cir.), *cert. denied,* 449 U.S. 905 (1980). Although an intra-circuit conflict is not an appropriate basis for certiorari, we note that there is no such conflict. *Red Lake* affirmed the decision in *United States v. Minnesota,* 466 F. Supp. 1382 (D. Minn 1979), which, like *Klamath,* involved rights that were "mere incidents of Indian title, not rights separate from Indian title." *Id.* at 1385.

A. There Is No Conflict Among the Circuits.

The treaty provision at issue in *Repsis*, set forth in Article 4 of the 1868 Crow Treaty, was identical to that contained in Article 4 of the 1868 Shoshoni-Bannock Treaty, which was before the Court in *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Ward*, the Court held that the right embraced only "unoccupied" lands of the United States, and only until the United States transferred title to such lands. 163 U.S. at 509-10. Such a right, the Court held, was "temporary and precarious" and therefore not intended to survive statehood. *Id.* at 510-16. The *Repsis* court, construing identical treaty language, adopted *Ward's* interpretation of that language. Both *Ward*, 163 U.S. at 515, and *Repsis*, 73 F.3d at 991, recognized that a right that was "continuing" in nature would *not* be impliedly repealed under the equal footing doctrine.

The Eighth Circuit recognized and applied this distinction. App. 53-55. However, considering the District Court's comprehensive historical analysis, the Eighth Circuit distinguished the rights at issue in *Ward* and *Repsis* from the rights reserved in Article 5 of the 1837 Chippewa Treaty. App. 55 (citing App. 188, 453-54). The latter are *not* limited to "unoccupied" lands and are *not* dependent on the United States retaining title to particular parcels of land, *id.*, but were intended to "guarantee[ ] the Bands the right to continue their way of life through hunting, fishing and gathering." App. 150. Accordingly, they are not temporary and precarious within the meaning of *Repsis*, "but instead were intended to be continuing rights." App. 55.[25]

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25. The State asserts (Pet. 12) that the Eighth Circuit "deviated from the framework established in *Ward* and *Repsis* by asserting that the equal footing doctrine only applies to rights which are tied to ownership of the land." This is a misreading of the Eighth Circuit's opinion, which recognized the distinction between "temporary and precarious" rights and "continuing" rights. The Court simply noted that it was the dependency of the rights at issue in *Ward* and *Repsis* on the lands remaining both "unoccupied" *and* in the ownership of the United States that established their "temporary and precarious" nature.

The State argues (Pet. 13-14) that because Article 5 permits the President to revoke the right, it is not "continuing" in nature. However, as the Eighth Circuit held, "the fact that the rights could be revoked by the President, or abrogated by Congress like any other treaty right, does not deprive them of their 'continuing' nature." App. 55-56 n.42. Thus, under *Repsis*, there is no basis for finding they do not survive statehood.

B. Supreme Court Decisions Confirm that the Eighth Circuit's Decision Was Correct.

The correctness of the Eighth Circuit's holding is firmly established by this Court's decisions, which hold that a treaty right, even one which the United States reserves the power to later revoke, is *not* invalidated by the equal footing doctrine. For example, in *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 193 (1876), the Court held that the Constitution authorized a post-statehood treaty extending the federal liquor laws to ceded lands "until otherwise directed by Congress or the President of the United States." The Court rejected the claim that this provision violated the equal footing doctrine, holding that it was authorized by the Federal Government's power to treat with Indian tribes. *Id.* at 197.[26] In *Johnson v. Gearlds*, 234 U.S. 422 (1914), a *pre-statehood* treaty was challenged on the same grounds. The Court unanimously reversed the District Court's holding that Article 7 of the 1855 Treaty, which barred the introduction of liquor into lands that had been ceded by the Treaty "until otherwise provided by Congress," was repealed by the Minnesota enabling and admitting acts. The Court held:

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26. The Court subsequently held that the Federal Government has the power to reserve hunting and fishing rights in *pre-statehood* Indian treaties, and that such rights are not repealed upon the admission of a state into the Union. *United States v. Winans*, 198 U.S. 371, 382 (1905). The Court has reconciled such rights with State regulatory authority in a long series of cases. *See* App. 56-58; *see also* note 6 above.

> [I]f the making of such a treaty after the admission of the state is not inconsistent with the "equal footing" of that state with the others, — as, of course, it is not, — it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.

Id. at 439. The power of the United States to enact the treaty provision, the Court confirmed, was "thoroughly established." *Id.* at 438-39.[27]

These cases confirm that rights such as those at issue here are not impliedly repealed under the equal footing doctrine, and that the Eighth Circuit correctly distinguished such rights from those at issue in *Ward* and *Repsis*. In any event, the Eighth Circuit's analysis gives full credence to *Repsis* and presents no conflict warranting certiorari.

IV. ISSUES NOT RAISED BY THE STATE[28]

A. Indian Claims Commission.

The Landowners allege (Pet. 24-30) that there is a conflict among the Circuits over the question whether an Indian Claims Commission (ICC) award for the value of ceded land extinguishes hunting and fishing rights. The Eighth Circuit's careful analysis

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27. The Court reached the same result in two Wisconsin cases involving Chippewa occupancy rights under Article 2 of an 1842 Treaty, which were also subject to a power of revocation. *Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *United States v. Thomas*, 151 U.S. 577, 584 (1894).

28. As noted above, only the Counties or Landowners raise these issues.

of this issue (App. 48-51) shows there is no such conflict.[29] The Court held that where a treaty explicitly reserves usufructuary rights on ceded land — such as the 1837 Treaty here — ICC silence with regard to those rights when awarding compensation for the ceded land " 'implies no determination as to those rights.' " App. 50.[30] In contrast, where a treaty is silent regarding usufructuary rights on ceded lands — such as the 1901 Agreement at issue in *Klamath* — silence by the ICC regarding those rights coupled with a payment for the land implies that the rights were " 'disposed of by the cession of the land.' " App. 50.

Other federal courts have recognized this distinction and have held that an ICC award for the value of ceded land does not bar claims based on usufructuary rights that were expressly reserved when the land was ceded.[31] There is no conflict.[32]

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29. The Landowners' description (Pet. 26-27) of the proceedings before the ICC intermixes statements made in superseded petitions in one case involving only some of the Bands with statements made in wholly different cases, including one brought under a different jurisdictional act. For an accurate description of the proceedings, *see* App. 39-48.

30. The ICC did not have jurisdiction to extinguish tribal rights, but only to award compensation for property acquired or rights terminated by the United States. *E.g. United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir.), *cert. denied*, 493 U.S. 890 (1989).

31. *E.g. United States v. Washington*, 135 F.3d 618, 637 (9th Cir. 1998) (reaffirming *United States v. Washington*, 459 F. Supp. 1020, 1039-42 (W.D. Wash. 1978)); *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), *cert. denied*, 506 U.S. 822 (1992) (distinguishing the Chippewa's 1837 Treaty as discussed in *Lac Courte Oreilles* from the Shoshone Treaty, which did not expressly reserve usufructuary rights); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983); *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013, 1014 (9th Cir. 1967).

32. Apart from *Molini* (*see* note 31 above), the cases cited by the Landowners (Pet. 29 n.42 & 43) do not involve usufructuary rights.

B. Standard of Review.

The Counties assert (Pet. 23-25) that there is a conflict concerning the standard of review, citing Ninth and Tenth Circuit cases. The Ninth Circuit reviews treaties and executive orders *de novo,* but reviews findings of historical fact for clear error.[33] The Eighth Circuit did the same here. App. 27, 37-38.[34] The Tenth Circuit case cited by the Counties is distinguishable and does not establish a conflict.[35]

C. State Regulatory Authority.

As discussed above (*see* note 6 and accompanying text), the District Court applied the "conservation necessity" standard developed by this Court to determine the permissible extent of State regulatory authority. The Eighth Circuit agreed that this was the proper standard. App. 57-58 n.43. The Landowners present three questions concerning this standard (Pet. i-ii, #3-5). First, they ask "[w]hether by virtue of the Nelson Act . . . and the General Allotment Act . . . the Chippewa were subject to state regulation for all off-reservation hunting and fishing activities." Pet. i, #3. However, they cite no provision of either Act that purports to affect such off-reservation rights, and cite no case holding that either Act affects such rights. Pet. 21.

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33. *See United States v. Washington,* 135 F.3d at 629-30; *Confederated Tribes of Chehalis v. Washington,* 96 F.3d 334, 342-43 (9th Cir. 1996), *cert. denied,* 117 S. Ct. 1432 (1997); *United States v. Aam,* 887 F.2d 190, 194 (9th Cir. 1989).

34. In many instances, the Eighth Circuit's independent review of the record amounted to a *de novo* examination of factual issues as well. *See* App. 26-27 ("[i]t is clear to us that the Bands . . . did not consent"), 36-37 (reviewing historical facts concerning 1855 Treaty).

35. The Court reviewed a mixed question of law and fact *de novo* because it "primarily involve[d] the consideration of legal principles." *Pittsburgh & Midway Coal Min. Co. v. Yazzie,* 909 F.2d 1387, 1393-94 (10th Cir.), *cert. denied,* 498 U.S. 1012 (1990).

Second, the Landowners ask whether any immunity from State regulation conflicts with *Klamath*, Pet. i, #4, contending there is a distinction between a treaty "right" and a treaty "privilege". Pet. 15-16. *Klamath* does not support this distinction; the Court used the terms interchangeably in discussing the "conservation necessity" standard. *E.g.* 473 U.S. at 765 n.16, 768. Other courts have expressly rejected the distinction. *E.g. State v. Miller*, 102 Wn.2d 678, 683, 689 P.2d 81, 84 (1984).

Third, the Landowners ask whether any limitation on State regulation violates the Tenth Amendment. Pet. i-ii, #5. However, as noted above (note 26), this Court has squarely held that the Federal Government had the power to guarantee hunting and fishing rights in Indian treaties, and used the "conservation necessity" standard to reconcile such rights with State sovereignty. Where the Federal Government has power to take action, "the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States,* 505 U.S. 144, 156 (1992).

D. Allocation.

The Counties (Pet. i #3) ask "[w]hether a federal court may decline to apply this Court's 'moderate living' doctrine . . . and order a maximum of one-half the hunting and fishing be dedicated to Indian Bands' harvest . . ." However, there is no court order allocating 50 percent of the resources to the Bands. *See* App. 60-61. The Bands' own management plans restrict Band harvests "well below" 50 percent of the available harvest. App. 130. The Eighth Circuit held that there was no present need for a further, judicial allocation because there was "no danger of depletion of resources," App. 65, nor any showing by defendants that their right to any resource has been harmed. App. 66. The Counties (Pet. 28-29) do not discuss these rulings and make no attempt to show that they conflict with any precedent of this or any other Court. Certiorari is not appropriate to review a decision that denied a request for an allocation "without prejudice." App. 163.

CONCLUSION

The Petitions for Certiorari should be denied.

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